

The Howell Group, LLC dba



TELECOMMUNICATIONS CONSULTING ASSOCIATES
101 Flat Rock Gap Road
Waynesville, NC 28785
munihelp@bellsouth.net www.munihelp.com
828-627-8415(O) 828-627-8505(F)

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Federal Communications Commission

Cc: John Horton
Natalie Roisman

Re: Notice of Proposed Rulemaking ("NPRM") (MB Docket 05-311)

I am writing in response to BellSouth's comments on Docket 05-311 made on February 13, 2006.

From 1995-2001 I was employed by BellSouth Telecommunications and various BellSouth subsidiaries as a Senior Director. While at BellSouth, I was responsible for applying for cable television franchise agreements after the 1996 Act. This task included drafting and negotiating BellSouth cable television franchises. I drafted documents and applications associated with BellSouth franchises and coordinated many of the aspects of the franchise process including representing BellSouth in public hearings and debates.

Prior to joining BellSouth, I had a career in the cable television industry from 1980-1995. In 1995 I ended an eleven-year stint as Vice President and General Manager of Summit Cable Services, a major MSO operating in North Carolina and Georgia. In 2001 I formed my own municipal consulting firm and currently represent over 200 city and county clients. My firm's focus is negotiating cable television franchises for city and county clients in North Carolina, South Carolina, Georgia, Tennessee, Virginia, West Virginia and Alabama. I am uniquely qualified to address cable television franchise negotiations and specifically the comments made by BellSouth. All of the following information is in the public domain.

During 1996-1997, BellSouth sent franchise proposals to approximately 40 cities and counties in North Carolina, Tennessee, Florida, and Georgia and was awarded 18 cable television franchises. BellSouth had previously been awarded

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franchises in Charleston, South Carolina and Vestavia Hills, Alabama. The vast majority of these franchise awards were completed within several months with two franchises taking less than six weeks. Many of the areas represented by the franchises held by Bellsouth have not experienced cable television competition by BellSouth. Additionally, BellSouth formally withdrew franchise proposals in ten communities. The specific are communities below.

Bellsouth franchises applied for in 1996-97 but withdrew: Raleigh, Cary, Apex, and Charlotte, NC; Wake and Mecklenburg Counties, NC; Collierville, Germantown, and Shelby County, TN; Nashville and Davidson County, TN

Bellsouth franchises awarded: Woodstock, Roswell, Duluth, Lawrenceville and Chamblee, GA; Gwinnett, Cherokee, DeKalb and Cobb Counties, GA; Orlando, FL; Orange and Seminole Counties, FL, St. Johns County, FL; Pembroke Pines, Davie, Coconut Creek, FL; Broward and Dade Counties, FL; Bartlett, TN, Charleston, SC and Vestavia Hills, AL

Bellsouth franchises where little or no construction has taken place: Coconut Creek and Orlando, FL; Broward, Orange and Seminole Counties FL and Bartlett, TN

In its comments BellSouth continually discusses the amount of time it took to be awarded the franchises. BellSouth states that the average franchise took 10 months to secure, which in my opinion and after 26 years of negotiating cable television franchises, is a relatively short amount of time. In 1997, BellSouth held more franchises than any other RBOC. BellSouth could have secured many more franchises if they had addressed the following issues:

- 1) Bellsouth assigned me many other responsibilities in addition to franchise work, including managing the entire BellSouth Entertainment staff in Atlanta. My “franchise work” was part-time at best.
- 2) BellSouth withdrew franchise applications in all North Carolina and Tennessee communities during 1997, except in Bartlett, Tennessee, where it has held an inactivated franchise for nearly 10 years.

Response to BellSouth comments about DeKalb County, Georgia

BellSouth’s comments regarding DeKalb County, Georgia could be very misleading. I participated in that project working with Robyn Crittenden, counsel for the County and Doug Hall, the County Cable TV administrator. The County utilized the services of outside counsel also. Since leaving BellSouth, I have maintained open dialogue with all of these individuals.

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BellSouth's comments are correct in that the company had already built cable plant to about 4000 homes in northern DeKalb County, around the City of Chamblee, in anticipation of conducting a video dial tone trial. The area in northern DeKalb County included more affluent subdivisions. BellSouth had also constructed cable plant within portions of the City of Chamblee and had already been awarded a franchise there that only took two months to negotiate. DeKalb County's attorneys originally requested that BellSouth build out all of the County. The actual franchise agreement reflects that BellSouth was required to build cable plant to a few thousand additional homes in the southern portion of DeKalb County over several years and was not instructed where to build except that the area was to be south of Memorial Drive. This area represented a part of the County that was predominantly minority and less affluent than northern DeKalb County.

BellSouth states that it had to agree to an annual PEG payment of \$2.50-\$4.00 per subscriber. This amount actually matched the amount that Scripts and MediaOne had also agreed to pay to the County in their separate cable television franchise.

BellSouth complains about being required to support an I-Net in the County. This "support" was simply funding to interconnect to the incumbent cable operator. Similar language appears in many other BellSouth franchises. For instance, in the Cherokee County, Georgia franchise, Section 3.5 reads:

*3.5. PEG Access. Company recognizes the need and benefits derived from the provision of channels for the use of Public, Educational and Governmental Access. Because Company's cable facilities will cross multiple franchise boundaries to compete with multiple cable providers and serve portions of numerous franchise areas, Company must have the flexibility to determine, based on technical considerations and market conditions, the manner of meeting PEG access requirements. Company intends to provide up to six (6) total channels to the entire multi-jurisdictional area, more commonly referred to as the greater Atlanta Metro, as follows: Public Access: One (1) channel for common use; Education: Two (2) channels for common use; and Government: Three (3) channels for common use. Until such PEG access arrangement is operational, **Company will enter into negotiations with the incumbent cable operator(s) to interconnect and retransmit the incumbent operator's PEG feed.** When Company has 10,000 customers or at the end of eighteen (18) months, whichever comes first, Company will begin construction on a common use state of the arts studio at a location to be mutually agreed upon between all Franchise Authorities where Company has a similar Agreement. Company's studio will be made available to participating Franchise Authorities for the purpose of originating and or transmitting the six (6) aforementioned Access*

channels. Company recommends and will facilitate the establishment of a multi-jurisdictional committee comprised of one (1) representative from each Franchise Authority where Company has a similar Agreement. This multi-jurisdictional committee will determine and administer the rules for the operation of the PEG channels on the basis of each representative having one vote of equal weight. They may elect to utilize franchise fees for the purpose of funding any additional costs that they may incur in the provision of their activities. Company will reserve the right to use the facilities of the Studio for its own use during any non broadcast time and during broadcast time to the extent such use does not directly interfere with the use of such facilities in connection with the operation of the PEG channels. Company will be allowed to acknowledge its support of these channels through periodic on air identification with its branded logo. Company further agrees to provide periodic training for the various Public, Educational and Governmental parties in the safety and operation of the studio equipment. Franchisor agrees to indemnify and hold Company harmless for any litigation or claim arising from the broadcast of material on any of the PEG channels.

BellSouth complains that it was required to “give up to 10% of BEI’s spare conduit capacity for County use”. As noted in its comments, BellSouth had constructed the original DeKalb cable plant under the old video dial tone rules, meaning that BellSouth Telecommunications had actually built the network and not BEI, or BIMS, the franchisee at the time. If BEI did not own the conduit, then the requirement to share conduit could not apply. Appendix B of the Cherokee County, Georgia franchise reads:

APPENDIX B

SYSTEM CHARACTERISTICS

Section I. Description of CATV System and Ownership of Facilities

A. Description of CATV System Facilities

The cable system will be comprised in part of state-of-the-art, headend and broadband transmission facilities either owned by BIMS or leased by BIMS from its affiliate, BellSouth Telecommunications, Inc. These facilities are described as a Hybrid Fiber Coax Architecture, comprised of optical trunks and feeders with coaxial feeders and distribution. Associated signal generation, regeneration, reception and control equipment are included to provision the delivery of cable services to subscribing members of the public who pay for such service. This architecture is two-way capable and designed to meet the expected cable service requirements of the

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persons residing within the Franchise Area. The system is capable of supporting the transport of at least seventy (70) analog channels, as well as the future provision of over one hundred (100) digital broadcast and switched digital channels. The system is designed to enable the addition of analog and/or digital capacity up to the capable capacity of 750 MHz as market and economic conditions warrant. The system shall be installed, maintained, and operated at all times in full compliance with the technical standards of the FCC and this franchise ordinance.

And finally BellSouth complains that BEI agreed to a long list of special and miscellaneous operational, facility and customer service requirements, yet this “long list” is not identified nor is it differentiated from any requirements already in place on the incumbent cable operators.

The onerous requirements cited in this example are very misleading when taken out of the context of the actual DeKalb County franchise document.

BellSouth does not comment on the open and friendly reception that I received in community after community, or the fact that we turned down dozens of requests by communities to come and make an application to them also. I met with representatives of all 29 municipalities of Broward County at a joint municipal meeting in Coconut Creek, Florida in 1996 and was asked by each of them to please come forward with an application. They were all represented by one attorney, Matthew Leibowitz, and during the public meeting he agreed to facilitate a multi-jurisdictional franchise agreement. Applications were filed only with Pembroke Pines, Coconut Creek, Coral Springs, Miramar, Davie and Broward County. BellSouth was awarded franchises in all instances except Coral Springs, where Mr. Rawls states BEI withdrew its application.

BellSouth also does not outline the extremely quick process that it experienced in Woodstock, Georgia and Cherokee County, Georgia, where it only took six weeks to secure cable franchises. While these communities welcomed BellSouth, it took nearly two years for BellSouth to activate any cable plant in these two communities. In my present role as municipal consultant, I have worked with the City of Woodstock and Cherokee County, GA. The City and the County report that they have approximately 52,000 homes combined. BellSouth reports to each that it has built services to approximately 16,000 homes (30%) in the ten (10) years that BellSouth has held these two franchises. I am personally familiar with the areas where BellSouth has constructed cable facilities in these two communities, and the households generally represent upscale homes in very new affluent

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subdivisions. This fact alone should give government officials cause for concern about redlining or cherry picking.

Under a contract I have with the Association of County Commissioners of Georgia, I represent Cherokee County, GA. On September 19, 2005, the president of BellSouth Entertainment wrote to Cherokee County, Georgia: “at this time we do not have any active plans to expand our existing cable facilities...” BellSouth has the right to build cable television facilities anywhere it wants to in Cherokee County. Why haven’t they extended their present cable plant?

As noted above, in its comments about DeKalb County, Georgia, BellSouth complains that it had to agree to a long list of special and miscellaneous operational, facility and customer service requirements. These types of requirements are included in a cable television franchise to ensure that the cable operator provides quality customer service, adheres to the terms and conditions of the franchise agreement and properly pays the franchising authority its franchise fees. During 2005 my firm conducted a compliance audit of BellSouth’s cable television operations in Cherokee County, Georgia. Our audit report indicated that BellSouth had underpaid its franchise fee payments to Cherokee County for the period of time from January 1, 1999-December 31, 2004 in an amount of \$163,491.66. During the course of the audit, BellSouth’s advised the County that “as a result of an internal financial review, an inadvertent financial reporting error was discovered that resulted in an underpayment of the Cherokee County franchise fees”. BellSouth issued a check to the County in the amount of \$178,538.42 for the same audit period plus the year of 2005. This example illustrates why it is important for LFAs to maintain local oversight of the various cable operators in their community.

During 1997-99 BellSouth constructed cable plant to households in South Florida and Atlanta, where it held various franchises. That construction and the original video dial tone construction appears to represent the only construction undertaken by BellSouth, on a large scale, even though it has held these 20 franchises, representing nearly 1.4 million households, for nearly 10 years. How can BellSouth argue for ease of entry when it has failed to build even a small portion of the potential homes in these service areas? Once again, this fact should cause government officials concern about the possibility of cherry picking only “high return” neighborhoods, resulting in a widening of the digital divide.

It would appear the barrier to entry is the cost of construction, not the securing of franchises. It is disingenuous for BellSouth, Verizon or AT&T to suggest that cities and counties are a barrier to entry. On the contrary, I recently spoke to 400 North Carolina City and County managers. I asked

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them if they would award a phone company a competitive cable television franchise and all hands went up in the affirmative. I then asked them if their local phone company (BellSouth in most instances) had approached them about even discussing a cable television franchise, and not one hand went up. The telephone companies want the Commission or Congress to do their legwork in securing franchises. It is not fair, it is not equitable nor is it necessary.

BellSouth has not served a copy of its Comments with several of the local jurisdictions it names as examples of barriers to the provision of competitive video programming services. This should demonstrate that BellSouth's claims are not accurate. There is not a widespread local government problem causing BellSouth to be unable to offer competitive video services. Were it not for colleagues of mine in other parts of the country bringing BellSouth's allegations to my attention, the Commission would not have had the opportunity to consider "the other side of the story." While the Commission's rules (47 CFR Sec. 1.1206(a), Note 1) only require that notice be provided to named local governments in declaratory proceedings, the problems created by the lack of notice in this docket should demonstrate the need for the Commission to require notice in all proceedings where preemption of local authority is a possible outcome. Due process requires nothing less. The Commission should never make public policy based upon allegations that are not shared with the parties who will be affected by that policy, and the Commission cannot be confident that the record made by opponents of local franchising in this matter is accurate or complete.

Although the local franchising system protects important goals, this does not mean it cannot be streamlined. Local government stands ready to engage with state and federal legislators as they consider changes and reforms to the existing system consistent with our mutual goals of promoting competition for all our citizens.

I will be happy to discuss this matter with you personally if necessary and look forward to responding to any questions you might have.

Sincerely,

John C. Howell
Owner, The Howell Group, LLC
Telecommunication Specialists

On behalf of the following cities and counties:

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North Carolina: Counties of Avery, Buncombe, Haywood, Cherokee, Caldwell, Mitchell, McDowell, Pender, Polk, Wayne, Wilkes, Franklin, Stanly, Alexander, Craven, Watauga and Henderson. Cities of Asheville, Laurinburg, Sylva, Spruce Pine, Scotland Neck, Bakersville, Washington, Waynesville, Winston-Salem, Belmont, Mount Holly, Fletcher, West Jefferson, Tryon, Marion, Wilkesboro, North Wilkesboro, Carolina Beach, Boone, Seven Devils, Laurinburg, Beech Mountain, Sugar Mountain, Banner Elk and Thomasville.

Tennessee:

Cleveland, Elizabethton, Knoxville, Alcoa, Maryville, Clinton, Johnson City, Bristol, Bolivar, LaVergne, Morristown, Waynesboro, Surgoinsville, Paris, Milan, Savannah, Sparta, Mount Carmel, Manchester, McMinnville, Pulaski, Goodlettsville, Clarksville, Newport, Tullahoma, Dover, Sevierville and Shelbyville; Counties of Henry, Blount, White and Coffee.

Georgia:

Peachtree City, Dalton and Athens; The Counties of Clarke, Polk, Crisp, Troup, Dougherty, Cherokee, Whitfield, Fayette, Rabun, Habersham, Barrow, Baldwin, Bulloch, Columbia, Floyd, Jackson, Jefferson, Jenkins, Oconee, Sumter, Murray, Union, Dade, Dawson and Upson.

South Carolina:

Gray Court, Greenwood, Camden, Lyman, Greer, Lyman, Simpsonville, Spartanburg, Greenville, Mauldin, Seneca, Clemson, Central, Gaffney, Pickens, Sumter, Travelers Rest, Rock Hill, Clinton and Central; The Counties of Dorchester, Georgetown, Cherokee, Spartanburg, Union, Greenville, Laurens, Orangeburg, Pickens and Horry.

Others:

Daphne, AL, Bristol, VA, Wytheville, VA, Wythe County, VA, Mecklenburg County, VA.